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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

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*WALLACE O. LEONARD, HARRY W. HOLT, RODNEY B. PIERCE, DONALD P. KIPP, W. J. LAUGHLIN, DUFFIELD W. YACKS, AND FRANK O. BLUNDEN,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

PETITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Wallace O. Leonard, Harry W. Holt, Rodney B. Pierce, Donald P. Kipp, W. J. Laughlin, Duffield W. Yacks and Frank O. Blunden pray that a writ of certiorari issue to review the Order or Judgment of the Circuit Court of Appeals for the Sixth Circuit entered April 15, 1953, affirming the decision of the Tax Court of the United States. (R. 197). Petition for rehearing was denied June 18, 1953. (R. 211).

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* These seven cases, originating on the separate petition to the Tax Court of each petitioner, were consolidated in that Court and tried on one record and the Tax Court made one Findings of Fact and rendered one Opinion. The separate petitions for review by the Circuit Court of Appeals were similarly consolidated in that Court, which entered one Order or Judgment for all cases.

STATEMENT OF MATTER INVOLVED

The facts material to the single issue here, as found by the Tax Court, succinctly stated, are as follows: (The Record in the Court below was printed as appendix to Petitioners' brief under the Rules of that Court):

The income in question is the profits received by the respective wives of Petitioners from the purchase and resale of war surplus motors in three joint ventures or transactions in 1946 (R. 181a). Petitioners were not parties to or participants in these ventures (R. 185a, 187a). Petitioners did not contribute any capital to such ventures (R. 188a) and did not act on behalf of their wives in connection with such ventures (R. 189a).

The funds received by each of the wives from the three transactions were deposited by her in her separate bank account and none of such funds were spent or used for the benefit of any of Petitioners (R. 188a). None of the profits from the three transactions were paid over to Petitioners (R. 188a-189a). Each wife reported on her separate income tax return for 1946 her share of the profits from such ventures (R. 182a), and paid the tax thereon.

These ventures of the wives originated and were carried out as follows:

In November, 1945, Petitioners formed a joint venture to purchase from Wilson Company, a manufacturer of automotive engines, 400 Army surplus motors and to resell them, which motors had been ordered from the War Assets Administration by Wilson Company, of which Petitioners Leonard and

Holt were officers (R. 183a, 184a). Kipp and Blunden were officers of Kramer Bros., a motor truck common carrier; Laughlin was a distributor for a truck manufacturer; Yacks and Pierce were partners in a truck and trailer sales and service business. (R. 182a, 183a). Petitioners knew from their experience and associations in the trucking business that there was great demand for such motors as replacements in civilian trucks. (R. 183a).

These 400 motors were resold in early 1946 by Petitioners' venture, using the office facilities of the Yacks and Pierce partnership, on orders sent in by other employees of Kramer Bros. and on orders sent in in response to a circular letter mailed in January 1946 from the partnership office (R. 184a-185a). The net profit from the sales of the 400 motors was distributed to Petitioners in accordance with their agreement—8.3% each to Leonard and Holt and 13.9% to each of the other Petitioners and Dalrymple, the other party to the agreement. (R. 185a). Petitioners did not join together in any other venture to buy and sell war surplus material (R. 188a).

In January, 1946, additional surplus motors were ordered from the Government by Wilson Company, their availability having been brought to its attention through Kipp or Pierce. (R. 185a). Petitioners advised their respective wives to form a venture to purchase such additional surplus motors from Wilson Company and to resell them, as they thought it was an opportunity for the wives to gain independent income and also considering possible tax consequences. (R. 186a). On March 29, 1946, the wives formed such a venture, with Dalrymple, to purchase 150 motors

from Wilson Company and to resell them, and an agreement of purchase and sale was entered into with Wilson Company. Under their agreement each wife and Dalrymple contributed $3,000 cash as capital for the enterprise, and the agreement provided that the net profits should be distributed to the wives in the same proportions as had been provided for their respective husbands in Petitioners' 1945 venture (R. 185a-186a). Mrs. Holt paid in her $3,000 contribution from her independent funds; Mrs. Leonard paid in her $3,000 contribution with a loan from her husband (repaid May 1, 1946), and each of the other five wives paid in their respective $3,000 contributions with a gift of a like amount from their respective husbands. (R. 186a). On June 3, 1946, the wives formed a second venture, with Dalrymple, substantially similar in all material respects to their first venture, to purchase from Wilson Company 310 additional surplus motors and to resell the same, and an agreement of purchase and sale was entered into with Wilson Company. (R. 187a).

The motors so purchased by the wives in these two ventures were sold to the public in much the same way that the 400 motors had previously been sold by Petitioners in their 1945 venture. Little direct sales effort was required, primarily because the market had been established by Petitioners' 1945 venture. The office facilities of the partnership were used by the wives' ventures in making the sales of their motors and the wives' ventures paid the expense of such use. The same commission on sales was paid by the wives' ventures to those persons sending in orders, as had been established and paid by Petitioners in their

1945 venture. A girl in the partnership office took care of the receipt of orders and the placing of shipping instructions with Wilson Company and she was paid for her services by the wives' ventures. The sales price of the motors was paid by the purchasers to the wives' ventures and the wives' ventures paid the Wilson Company for its costs and charges in accordance with the agreements. (R. 187a).

On July 11, 1946, the wives and Dalrymple formed a third venture, similar to the preceding two ventures between them, to buy 1,000 additional surplus motors from Wilson Company and to resell the same, and at the same time such venture entered into an agreement of purchase and sale with Wilson Company similar in all material respects to the two previous agreements with such Company. These 1,000 motors were sold to Sears, Roebuck & Company on its purchase order dated July 11, 1946. This sale was arranged by Petitioner Pierce through an intermediary salesman, who was connected with the Allied Machinery Company of Indiana and whose connection, if any, with Sears, Roebuck is not known. The details incident to the carrying out of this sale and the placing of shipping instructions again were handled by the girl in the partnership office. (R. 187a-188a).

On these findings of fact the Tax Court (one Judge sitting) made the "ULTIMATE FINDING" that the income from the wives' three ventures "was earned and produced by the husbands and was income of the husbands" (R. 189a), and sustained the Commissioner's determination that such income is attributable and taxable to Petitioners. (R. 192a). Upon petitions for review by the respective Petitioners, which were

consolidated for hearing and decision, the Circuit Court of Appeals affirmed the Tax Court. (R. 197).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1953 (R. 197) and petition for rehearing was denied by order entered June 18, 1953 (R. 211). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (U.S.C. Title 28).

QUESTION PRESENTED

Whether the profit received by the wife of each petitioner on the purchase and resale of Army surplus motors in joint ventures between the wives and an unrelated individual, is income earned and produced by Petitioner and is the income of Petitioner, taxable to him, where he was not a party to or participant in such ventures, he contributed no capital or services thereto, and he had no command or control over such income and no use thereof.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Court below is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Simmons et al* v. *Commissioner,* 164 Fed. (2d) 220 and *Henson* v. *Commissioner,* 174 Fed. (2d) 846. The decision of the Court below also is in conflict in principle with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Visintainer* v. *Commissioner,* 187 Fed. (2d) 519; the decision of the Circuit Court of Appeals for the Fifth Circuit in *Alexander et al, v. Commissioner,* 190 Fed. (2d) 753, and the decision of the Circuit Court of Ap-

peals for the Seventh Circuit in *Greenberger* v. *Commissioner,* 177 Fed. (2d) 990.

In *Henson, supra,* the taxpayer transferred to his wife, as a gift, his wholly owned business which he had built up and operated from the same offices and with the same clerical help used in the operation of another business in which he was interested. Mrs. Henson had no business experience and Mr. Henson continued to operate the business as manager for his wife for which he was paid a salary. The Court of Appeals, reversing the Tax Court, held that the income received by the wife from such business was not created and produced by the husband, and that such income is taxable to the wife and not to the husband.

In *Simmons et al, supra,* the Court of Appeals held that where the taxpayers had transferred as gifts to their respective wives their entire interest in a partnership, the income received by the wives from such partnership is not the income of the husbands and is taxable only to the wives.

In *Greenberger, supra,* the Court of Appeals held that the income received by the wife of the taxpayer and by three trusts created by him and his wife from a partnership, their interests in which originated in gifts by the taxpayer, was not produced by the taxpayer and was not taxable to him. The partnership's income was derived almost exclusively from commissions earned upon sales and the business was managed and operated under the general supervision of the taxpayer, there being about fourteen sales engineers employed in the business.

In *Alexander et al, supra,* and *Visintainer, supra,*

the taxpayer, who long had been engaged in the ranching and cattle or sheep raising business, made a gift to his minor child or children of some ranch property and some cattle or sheep. It was held that the income derived and received by the children from sales or dealings in the cattle or sheep, as well as from other ranch operations, carried out for them by the taxpayer, was not earned or produced by the taxpayer and was not income taxable to him.

2. The decision of the Court below is at variance with and is probably in conflict with applicable decisions of this Court. In affirming the "ULTIMATE FINDING" of the Tax Court that the income received by the wives was earned and produced by the husbands, clearly a conclusion of law, the Court below holds that income received by the wife of a taxpayer from joint ventures (or partnerships), of which she was a member and in which he did not participate, is income of the taxpayer, solely on the ground that the wife's venture adopted the procedures established by the taxpayer in a previous venture of his own.

Such holding, we believe, is contrary to the principles of *Commissioner* v. *Culbertson,* 337 U. S. 733. There the Court took cognizance of the established rule that the income of a partnership, which by definition includes a joint venture (section 3797(a)(2), Internal Revenue Code) is taxable in full and only to the members thereof (see also concurring opinion of Mr. Justice Frankfurter). The Court pointed out that the absence of personal services or contribution of original capital by the son of the taxpayer to a partnership, controlled and operated by the taxpayer, are not alone sufficient to exclude the son as a partner and render

his share of the income attributable to the taxpayer, if the partnership is real. Here there is no finding that the joint ventures or partnerships between the wives was not real, but on the contrary the findings of the Tax Court recognize the reality of such partnerships. And also here, it is undisputed that Petitioners were not members of or participants in the partnerships of their wives.

The principle that under the revenue laws the income of a partnership is taxable in full and only to the individual members thereof long ago was established and applied by this Court in *Burnet* v. *Leininger,* 285 U. S. 136.

3. The Court below in the instant case has decided an important question of federal law which apparently has not been, but should be, settled by this Court. The Court below, adopting the opinion of the Tax Court, holds as a matter of law that income received by the wife of a taxpayer from a joint venture or partnership of which she is a member, is income earned and produced by the husband, where her venture adopts the mechanics and pattern developed and set by the taxpayer in a previous venture of his own utilizing his business knowledge and experience and contacts, even though he is not a member of or participant in the wife's joint venture and the income is not paid to him or spent for his use and is not under his command or control. While it is believed that such a holding is in conflict with the principles established by previous decisions of this Court, this precise question apparently has not been, but should be, settled by this Court. As said by the Seventh Circuit Court of

Appeals in the *Greenberger case,* supra, (P. 993), "A curious anomaly indeed would be presented if the petitioner were required to account for and pay a tax upon income which he had no right to receive but which right existed solely and exclusively in the wife and the three trusts."

WHEREFORE, it is respectfully submitted that the petition should be granted.

JOHN M. HUDSON,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

WALLACE O. LEONARD, HARRY W. HOLT, RODNEY B. PIERCE, DONALD P. KIPP, W. J. LAUGHLIN, DUFFIELD W. YACKS, AND FRANK O. BLUNDEN,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court of Appeals rendered no separate opinion but adopted the opinion of the Tax Court as its own and entered an order or judgment affirming the Tax Court. The judgment of the Circuit Court of Appeals affirming the decision of the Tax Court (R. 197) is not reported. The Memorandum Findings of Fact and Opinion of the Tax Court (R. 181a-192a) are not officially reported.

JURISDICTION, QUESTION PRESENTED, AND STATEMENT

The jurisdiction of this Court, the question presented, and a statement of the case will be found in the petition.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the income received by the wives of the respective Petitioners from joint ventures, of which the wives but not Petitioners were members, was earned and produced by Petitioners and is income of Petitioners.

STATUTES INVOLVED

The statutes here involved are the Internal Revenue Code (U. S. C. Title 26) and the pertinent sections thereof, so far as here material, are as follows:

> *Section 22(a).* "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.
>
> *Section 181.* Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.
>
> *Section 182.* In computing the net income of each partner, he shall include, whether or not distribution is made to him—(in addition to his share of capital gains and losses of the partnership)—
>
> (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).
>
> *Section 3797(a)(2).* The term "partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, * * *; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

ARGUMENT

The Circuit Court of Appeals, adopting the opinion of the Tax Court as its own and affirming the decision of the Tax Court on its findings and opinion, holds that the income received by the wives of the respective petitioners as her distributive share of the profits from the sales of motors by joint ventures or partnerships of which she was a member, was earned and produced by the respective petitioners and was their income. Such holding, although designated by the Tax Court as "ULTIMATE FINDING", clearly is a conclusion of law. See *Helvering* v. *Tex-Penn Oil Co., et al,* 300 U. S. 481, and *Bogardus* v. *Commissioner,* 302 U. S. 34. The decision of the Circuit Court of Appeals so holding is in conflict with decisions of the Circuit Courts of Appeals for the Fifth Circuit and for the Seventh Circuit. The decision below also is in conflict in principle with other decisions of the Circuit Courts of Appeals for the Fifth and the Tenth Circuits, and, it is believed, is probably in conflict with applicable decisions of this Court.

There is no dispute as to the basic facts material to the issue involved (except the finding that "capital was not an important factor in any of the wives' ventures" (R. 189a) which is not urged now as error). The findings of fact show that Petitioners were not members or participants in the joint ventures or partnerships of the wives, that they did not contribute capital thereto and did not act for their wives in such ventures, and that the income from such ventures was not paid to them or spent for their benefit and was not under their dominion or control.

The holding of the Court below is based entirely upon the fact that Petitioners in their 1945 venture, utilizing their business experience and knowledge and contacts, developed the mechanics and set the pattern for profitably finding, adapting and reselling war surplus motors, and that the wives took over or availed themselves of such mechanics and pattern in carrying out the wives' 1946 ventures (R. 190a, 214). That is to say, Petitioners having formed a joint venture or partnership in 1945 and developed the plan and organization for profitably buying and reselling motors, which plan and organization they transferred or made available to joint ventures or partnerships of their wives for the future conduct of such business, retaining no interest therein for themselves, the Court below holds that the income received by the wives from such future conduct of the business was earned and produced by petitioners and was income of Petitioners.

In *Henson* v. *Commissioner,* 174 Fed. (2d) 846 (C.C.A. 5), the taxpayer transferred to his wife, as a gift, a baker's supply business which he had owned for sometime prior thereto and which was located in the same building, used the same offices, equipment, bookkeeper and stenographic help used for the operation of a dairy and ice cream supply business, in which he was interested with three other persons. Mrs. Henson had no business experience and Mr. Henson continued to operate the baker's supply business as manager for his wife. The Circuit Court of Appeals for the Fifth Circuit reversed the holding of the Tax Court that "the income produced by J. M. Henson Company during 1943 resulted from the use of its assets within the framework of the business organization which peti-

tioner had built up * * *. Such income was essentially created by petitioner and not by petitioner's wife." (10 T.C. 491, 497), and held that the income from the baker's supply business after the transfer is taxable to the wife and not to the husband.

In Simmons et al v. *Commissioner,* 164 Fed. (2d) 220 (C.C.A. 5) the respective taxpayers transferred to their wives their entire interests respectively in two partnerships formed two years earlier. The partnerships manufactured veneers and supplied the same to two corporations owned by the taxpayers for the manufacture of packing boxes. The wives did not perform any services of consequence on behalf of the partnerships, and did not participate to any extent in their management. The Fifth Circuit Court of Appeals held that the income received by the wives from the partnerships after the transfers by the respective petitioners of their entire interest therein was the income of the wives taxable to them alone and was not the income of the taxpayer.

In *Greenberger* v. *Commissioner,* 177 Fed. (2d) 990 (C.C.A. 7) the taxpayer, his wife and the trustees of three trusts created by them for their children formed a partnership, in which the interests of the wife and the trusts originated or were derived from gifts previously made by the taxpayer. The partnership was engaged in the business of selling certain steel mill products, in which business fourteen sales engineers were employed, and the income was derived almost exclusively from commissions earned upon sales. The business was managed and operated under the general supervision of the taxpayer and none of the other partners performed any service for or on behalf of

the partnership. The Court of Appeals held that the income received by the wife and the trusts from the partnership was not the income of the taxpayer and was not taxable to him, and reversed the contrary holding of the Tax Court, which was predicated upon the finding that capital was not a material income-producing factor and the holding that the taxpayer by rendition of personal service was responsible for the income.

The decision of the Court below is in direct conflict with the foregoing decisions of the Circuit Courts of Appeals for the Fifth and Seventh Circuits. The decision of the Court below also conflicts in principle with the decision of the Fifth Circuit Court of Appeals in *Alexander et al* v. *Commissioner,* 190 Fed. (2d), 753 and the decision of the Tenth Circuit Court of Appeals in *Visintainer* v. *Commissioner,* 187 Fed. (2d) 519. In those cases the taxpayer, who long had been engaged in the ranching and cattle or sheep-raising business, made a gift to his minor child or children of some ranch property and some cattle or sheep. The income derived and received by the children from sales or dealings in the cattle or sheep, as well as from other ranch operations, was held income of the children, taxable to them alone, and was not income earned or produced by the taxpayer, even though all sales and financial transactions were either handled or supervised by him and he performed what services were required in making it possible for the children to realize and receive such income.

The decision of the Court below also is probably in conflict with the principles established by this Court in *Commissioner* v. *Culbertson,* 337 U.S. 733. In that

case, which involved the reality, and thus the validity, of a partnership between the taxpayer and his son, this Court pointed out the Tax Court's erroneous interpretation and misapplication of the decision in *Commissioner* v. *Tower,* 327 U.S. 280. While the instant case does not involve a partnership between members of a family, as was involved in the *Culbertson* case, since Petitioners had no interest in the partnerships of their wives, the principles established by the Court in the cited case are applicable here. In that case the Court clearly recognized that under the Internal Revenue Code the income of a partnership, or joint venture, the reality of which is established or undisputed, is taxable only to the members of the partnership. (See also concurring opinion of Mr. Justice Frankfurter). In the instant case there is no finding of fact, and there is no evidence to support a finding, that the partnerships between the wives were unreal. On the contrary, the Tax Court found that such joint ventures or partnerships were between the wives and that petitioners were not parties to or members thereof. Accordingly, under the principles of the *Culbertson* case, the income from such partnerships is taxable only to the wives, the members of the partnerships.

The Circuit Court of Appeals in the instant case has decided an important question arising under the federal revenue laws which apparently has not been, but should be, settled by this Court. The Court below holds as a matter of law (*Helvering* v. *Tex-Penn Oil Co., et al,* 300 U. S. 481 and *Bogardus* v. *Commissioner,* 302 U.S. 34) that where taxpayers utilize their experience, contacts and associations to develop the

mechanics and set the pattern for the purchase and resale of property, i.e. to establish a business, and transfer or turn over such business to their wives, the income thereafter received by the wives from such business is earned and produced by the husbands and is income of the husbands. It was upon the basis of such holding alone that the income in the instant case was held taxable to petitioners under the rule established by this Court in *Lucas* v. *Earl,* 281 U.S. 111 and *Burnet* v. *Leininger,* 285 U.S. 136. The rule of those cases, however, afford no support for the basic holding of the Court below. The *Earl* case involved the salary earned by the taxpayer, who had made an anticipatory assignment to his wife of salary to be earned by him in the future. The *Leininger* case involved the taxpayer's distributive share of the income of a partnership, of which he was a member, and the anticipatory assignment by the taxpayer to his wife of an interest in his share in the future income of the partnership. The Court merely held, in the *Earl* case, that the anticipatory assignment of an interest in salary to be earned in the future could not relieve the taxpayer of the tax imposed by the statute upon income earned by him, and, in the *Leininger* case, that the assignment by a partner of an interest in his share of partnership income did not make the assignee a partner and that under the revenue laws partnership income is taxable alone to the individual partners.

No decision of this Court has held, or even suggested as far as we can discover, that income received by the wife of the taxpayer as her share of the distributive profits of a joint venture or partnership, of which the husband was not a member and to which he

contributed neither personal services nor capital, is income earned and produced by the husband and is his income, merely because the profits of such partnership of the wife were realized through the use of the mechanics and pattern developed and set by the husband in a previous joint venture which were assigned or made available to the partnership of the wife.

As said by the Court of Appeals in the *Greenberger case, supra,* (P. 993). "A curious anomaly indeed would be presented if the petitioner was required to account for and pay a tax upon income which he had no right to receive but which right existed solely and exclusively in the wife and the three trusts".

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous, and in view of the general importance of the question presented and the existence of a conflict of decisions, the petition for certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 340

WALLACE O. LEONARD, HARRY W. HOLT, RODNEY B. PIERCE ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 181a-192a) are not officially reported. The judgment of the Court of Appeals adopting as its own the Tax Court's opinion (R. 197) is reported at 203 F. 2d 566, and its memorandum order denying rehearing appears at pages 211-215 of the record.

JURISDICTION

The original judgment of the Court of Appeals was entered April 15, 1953 (R. 197), and was

amended on May 7, 1953 (R. 211). A petition for rehearing was denied on June 18, 1953. (R. 199-211.) The petition for a writ of certiorari was filed on September 12, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the Tax Court, on the whole record, was warranted in concluding that the income from three joint ventures, nominally entered into by taxpayers' wives, was earned and produced by taxpayers, rather than their wives, and was, therefore, income of the taxpayers.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
(26 U.S.C. 1946 ed., Sec. 22.)

STATEMENT

The facts, as found by the Tax Court (R. 182a-189a), may be summarized as follows:

Taxpayers are business men who in the taxable year 1946, and prior thereto, were actively engaged, either in their capacity as officers of a corporation or as partners, in either the trucking business, or the manufacture of motor trucks or automotive engines. (R. 182a-183a.) By reason of their extensive experience in and association with the trucking business, they knew that the trucking industry was greatly in need of motors to replace those which had deteriorated during the war years and for which replacements had not been manufactured. Having learned of the availability of surplus army half-track motors, and having consulted with one another on the feasibility of adapting them to civilian use, taxpayers evolved the idea of forming a syndicate to purchase these surplus motors from the War Assets Administration and resell them to the public for civilian use. (R. 183a-184a.) Accordingly, in November, 1945, taxpayers formed Kipp and Pierce Associates for the purchase and resale of some 400 surplus motors from Wilson Company, in which two of the taxpayers were officials. Wilson Company was eligible to purchase Government equipment, had adequate credit standing, and had the necessary facilities for reconditioning and adapting the army motors for civilian use. (R. 184a.) The motors were resold by Kipp and Pierce Associates early in 1946 to various persons. The partnership of tax-

payers Yacks and Pierce acted as sales agent for the Associates and mailed a great many circular letters to persons in the trucking industry announcing the availability of the motors. The response to these letters was "terrific". The worth of the motors became generally known through installations made in the trucks of Kramer Brothers Freight Lines, Inc., in which two of the taxpayers were officers, and many sales were made through employees of Kramer in various cities. Word was spread about by the Associates that a commission of $50 per motor would be paid to anyone who effected a sale. This fact, together with the general utility of the motors, resulted in their rapid sale with very little further direct sales activity or effort on the part of Kipp and Pierce Associates. (R. 184a-185a.)

The office facilities of the Yacks and Pierce partnership were used in carrying out the transactions and were paid for by the Associates. The motors were shipped by Wilson Company to the purchasers upon orders or shipping instructions placed by the Associates. Wilson Company invoiced the Associates for the cost of the motors plus service, storage, and shipping charges, and such invoices were paid by the Associates. The sales prices of the motors were paid by the ultimate purchasers to the Associates. (R. 184a-185a.)

The net profit of $102,890.50 realized by the Associates from the sale of the motors was distributed to taxpayers in accordance with their agreement, i.e., 8.3 per cent each to taxpayers Leonard and

Holt, and 13.9 per cent to each of the other taxpayers. (R. 185a.)

Thereafter, in March, June, and July, 1946, the wives of the respective taxpayers formed three different associations (hereinafter referred to as the first, second, and third wives' venture, respectively) for the purchase from Wilson Company of specific quantities of motors for resale. (R. 185a, 187a, 188a.) The agreement between the wives establishing the first venture was executed on March 29, 1946, at which time Wilson Company had received advice that additional motors ordered by them in January, 1946, had been shipped. (R. 185a.) Prior to the formation of this venture, several of the taxpayers consulted a tax lawyer with respect to the possible tax consequences. They advised their wives to join in the venture, viewing it as an opportunity for the wives to gain independent income. Under the terms of the agreement each of the wives deposited the sum of $3,000 in a bank account opened in the name of the first venture. In the case of five of the wives, the required $3,000 capital contribution was received as an outright gift from their respective husbands; one contributed her own money; and another received the money as a loan from her husband. The procedures whereby these motors were acquired from Wilson Company and sold to the public were substantially the same as in the case of the original transaction by the taxpayers, and the net profits were distributed in the same proportion as received by the husbands. Little direct sales activity was required, however, pri-

marily because the market had been established by the husbands' venture. (R. 185a-187a.)

The second and third wives' ventures and the procedures followed were substantially similar to their first venture. No capital contribution was required, however. (R. 187a-188a.) With respect to the third venture the motors were sold in one block to Sears, Roebuck and Company. The sale was negotiated by taxpayer Pierce through an intermediary, and the instructions to Wilson Company relative to the delivery of the motors in specific quantities to particular branches of Sears Roebuck, and other clerical details, were handled by the Yacks and Pierce partnership office. This third venture was formed on the same day that a purchase order for 1,000 motors, made out to the third venture, was received from Sears Roebuck. (R. 188a.)

In the case of each of the three wives' ventures, the agreement with Wilson Company provided that the proceeds from the sales of the motors be deposited in a bank account on which it was to have a lien for any sum due it under the agreement. (R. 186a-187a.) Wilson Company did not require the wives to contribute any capital, and capital was not an important factor in any of the wives' ventures. (R. 189a.) Neither, as far as the record disclosed, did any of the wives perform services in connection with their ventures other than to sign checks through designated representatives; nor, with two or three exceptions, did they have any prior business experience. (R. 189a.)

In each instance, the percentage of the net profits

received by each of the wives was the same as that received by their respective husbands under their venture. (R. 186a, 187a-188a.) None of the profits from these three ventures were paid to the taxpayers, and in each case the funds received by the wife in 1946 were deposited in her separate bank account and were not expended for the benefit of her husband. (R. 188a-189a.)

On the basis of all the facts, the Tax Court made an ultimate finding that (R. 189a) "The income from the three wives' ventures was earned and produced by the husbands and was income of the husbands", as had been determined by the Commissioner. The Court of Appeals affirmed. (R. 197.)

ARGUMENT

The issue whether the income derived from the wives' joint ventures was income to the husbands presents a question of pure fact, and both courts below have concurred in the findings made. The settled rule of this Court makes concurrent findings of two courts below final here in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214. The findings made in this case are fully supported by the evidence,[1] and the taxpayers have failed to demonstrate that exceptional error was committed. In the circumstances, no im-

[1] The factual determinations involved are similar to those involved in family partnership cases, and the findings of fact made by the Tax Court are conclusive where, as here, they are supported by sufficient evidence so that they cannot be deemed clearly erroneous. *United States* v. *Gypsum Co.*, 333 U. S. 364, 394-395, rehearing denied, 333 U. S. 869; *Commissioner* v. *Tower*, 327 U. S. 280, 287; *Lusthaus* v. *Commissioner*, 327 U. S. 293, 297.

portant question of law is presented which warrants review by this Court.

The evidence fully supports the Tax Court's conclusion that the income from the three wives' ventures was earned and produced by the husbands and was income to them. The joint ventures entered into by the wives from which the income was derived, like that previously entered into and carried out by the husbands in their own names, were concerned with the purchase, reconditioning, and resale of surplus army motors. The husbands, but not the wives, were well experienced in the particular field of business, and were associated with the business establishments having the necessary facilities and experience for accomplishing the purposes of the particular joint adventures. (R. 23a, 38a, 71a-72a, 76a-80a, 90a-91a, 104a-105a, 126a, 137a-138a, 183a-184a.) The wives, on the other hand, were all housewives and, with two or three exceptions, had no prior business experience at all, and none of them had any experience in buying or selling motors. (R. 90a, 119a, 126a, 145a, 150a, 168a, 176a, 189a). The husbands conceived the joint venture plan, set up the necessary business machinery for carrying it out, and then put it into successful operation. Subsequently, after at least four of them had consulted tax specialists and had received advice concerning the "tax problems" involved, and had become fully aware of the tax saving to be accomplished by having the joint ventures carried out in the names of their wives, the husbands suggested to their wives that they enter into joint ventures practically identical with the joint

venture that had been entered into by the husbands and successfully consummated by them. (R. 84a-85a, 143a, 168a, 186a, 190a.)

Thereafter, the wives, all but one having received capital given or loaned to them by their respective husbands, entered into the first of the three joint ventures involved.[2] (R. 47a, 185a-186a.) In carrying it out, they obtained the motors from the same source and through the name of the same company as that used by the husbands in carrying out their own joint venture (R. 131a, 146a, 183a). The same advertising and office facilities and the same sales methods and channels were also used (R. 71a-72a, 81a-82a, 93a, 97a, 182a, 190a). Each of the business establishments utilized for carrying out the wives' joint venture was one in which at least one or more of the husbands was an officer, partner, or an associate. Although a like $50 commission was offered to promote sales (R. 158a-159a), the demand for the motors had already become so great as to make it unnecessary to push their sale (R. 80a, 128a). The second and third

[2] The Tax Court found that capital was not an important factor in any of the wives' ventures (R. 189a). In the first wives' venture, the agreement required that each wife deposit the sum of $3,000 in a bank account to be opened in the name of that venture (R. 47a, 185a-186a). The agreements establishing the second and third ventures did not require the contribution of any capital (R. 53a-55a, 59a-61a). Nor had the husbands contributed any capital in connection with their own joint venture. The Wilson Company from whom the motors were purchased by both the husbands' and wives' joint venture was adequately protected by a provision in each of the purchase agreements which required that the proceeds of the sales made by the joint ventures be deposited in a bank account upon which the Wilson Company would have a lien for any sum due it under the purchase agreement. (R. 43a, 50a, 57a, 63a, 186a-187a.)

joint ventures entered into by the wives were carried out in an identical fashion.

The record fails to show that the wives did anything other than sign the agreements, open the bank accounts, and through their designated representatives sign checks for the expenses. As the Tax Court pointed out (R. 191a), the insignificance of the part played by the wives in the transactions is shown by a glance at the wives' third venture, which involved the purchase and resale of 1,000 motors to a single customer, Sears, Roebuck and Company. This sale was arranged virtually alone by one of the husbands, taxpayer Pierce. All of the details were worked out before the wives were brought into the picture, and a purchase order for the motors, made out in the name of the wives' third venture, was received from the purchaser on the date the venture was purportedly formed. (R. 59a, 64a, 163a-164a.) And despite the fact that each of the wives contributed the same amount of capital, the percentages of the profits received by them varied in exactly the same manner as those of the husbands had varied in the husbands' joint venture where a marked difference in effort contributed caused variations in the profits received by the husband members. No such difference in contribution of effort was shown in connection with the wives' joint ventures.

It is plain from the evidence adduced that the Tax Court correctly found (R. 189a) that the husbands did not act on behalf of their wives in connection with the wives' so-called ventures. They acted on their own behalf.

Taxpayers urge (Pet. 17-18) that the Court of Appeals erred in holding that the income involved was taxable to the husbands even though the husbands had, after establishing the business, transferred it to their wives. But the court below made no such holding. What the court below in reality held was that the husbands had made no transfer of the business to their wives, but had merely diverted income from their own business enterprises to the wives (R. 214-215).

The same considerations make it clear that the decision in the instant case is not in conflict, as alleged by taxpayers (Pet. 14-16), with *Henson* v. *Commissioner,* 174 F. 2d 846 (C.A. 5), *Simmons* v. *Commissioner,* 164 F. 2d 220 (C.A. 5), and *Greenberger* v. *Commissioner,* 177 F. 2d 990 (C.A. 7), for in those cases, the taxpayer-husbands made valid and irrevocable *gifts* of either a part or their entire interest and ownership in a business or business property.

In the *Henson* case, it was held that the circumstance that the husband continued to manage and operate the business, after having conveyed it to his wife in its entirety, did not serve to render him liable for taxes on the income therefrom. In the *Simmons* case, the holding was that gifts by the husbands of their entire interests in partnerships to their wives eliminated the husbands as partners and rendered the wives sole owners of the business and taxable on the income therefrom. In the *Greenberger* case, a husband made a complete and valid gift of shares of stock in a corporation, in which he was the principal stockholder, to his wife.

Subsequently, he and his wife created irrevocable trusts for the benefit of their three minor children, to each of whom they contributed shares of stock. Thereafter, the corporation was dissolved and a limited partnership was formed to which the husband, his wife, and each of the three trusts contributed certain sums of money from their separate estates. The Tax Court bottomed its finding that no valid partnership existed upon the premise that capital was not a material income producing factor. It also found that the wife and the beneficiaries of the trusts had not performed any vital services. On the basis of its interpretation of the decision of this Court in *Commissioner* v. *Culbertson,* 337 U.S. 733, which was handed down following the decision of the Tax Court, the Seventh Circuit remanded the case to the Tax Court for a finding on the intent of the parties.

In *Alexander* v. *Commissioner,* 190 F. 2d 753 (C.A. 5), and *Visintainer* v. *Commissioner,* 187 F. 2d 519 (C.A. 10), also cited by taxpayers, it was held that where a father, who in each case was a rancher, made gifts of cattle and sheep to his children, yet continued to manage and operate the business and develop his children's interests, he was not taxable on the income from the subsequent sale of such interests.

With the exception of the *Greenberger* case, *supra,* these cases were all decided on the principle that the absolute right of control over both the property and the income therefrom which inheres in a valid legal title, resulting from a *gift* of the entire property, serves to render the donee

rather than the donor liable for taxes on the income even though the donor continues to manage and operate the business as he did before making the gift. See *Blair* v. *Commissioner,* 300 U.S. 5; *Poe* v. *Seaborn,* 282 U.S. 101; and *Hoeper* v. *Tax Commission,* 284 U.S. 206. In the *Greenberger* case, *supra,* the taxpayer retained an interest in the partnership and hence the question of intent became important in determining taxability.

In the instant case, the taxpayer-husbands made no gifts of business property or of any interest therein to their respective wives.[3] The decision of the Tax Court proceeded on the theory that income is taxable to the person who earns it, irrespective of whether it is paid to someone else, as was held by this Court in *Burnet* v. *Leininger,* 285 U.S. 136, and *Lucas* v. *Earl,* 281 U.S. 111. Thus, rather than conflicting with the principles established by this Court in *Commissioner* v. *Culbertson, supra,* as asserted by taxpayers (Pet. 16), the decision in the instant case is supported thereby. By analogy with the partnership tests as laid down in that case, it is readily apparent that, since the wives did not participate in the management and control of the business ventures, performed no vital services, were not qualified to do either, contributed no original capital (with one exception), and since capital was not an important factor in the ventures, they did not in

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[3] Taxpayers do not contend that the income in question resulted from the gifts of $3,000 to each of five of the wives in connection with their first venture, and in fact it did not so result as appears from the record which amply supports the Tax Court's finding (R. 189a) that capital was not an important factor in any of the wives' ventures.

good faith and acting with a business purpose intend to join together in the business of buying, reconditioning and selling motors.

Tax consequences flow from the substance of a transaction, rather than its form, and independent business entities which have no substance must be disregarded for income tax purposes. *Helvering* v. *Clifford,* 309 U.S. 331; *Commissioner* v. *Court Holding Co.,* 324 U.S. 331; *Gregory* v. *Helvering,* 293 U.S. 465; *Griffiths* v. *Commissioner,* 308 U.S. 355; *Higgins* v. *Smith,* 308 U.S. 473. These principles were properly applied by the court below in holding that the three ventures entered into by the wives, although nominally independent, must be considered as merely extensions of the taxpayer-husbands' venture, and that the income received by the wives must be taxed to the husbands who earned it.

CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 340

WALLACE O. LEONARD, HARRY W. HOLT, RODNEY B. PIERCE, DONALD P. KIPP, W. J. LAUGHLIN, DUFFIELD W. YACKS, AND FRANK O. BLUNDEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR RE-HEARING ON PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Wallace O. Leonard, Harry W. Holt, Rodney B. Pierce, Donald P. Kipp, W. J. Laughlin, Duffield W. Yacks and Frank O. Blunden, Petitioners, by their counsel, John M.

Hudson, respectfully petition the Court for a re-hearing and reconsideration of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, which was denied by order of the Court on November 9, 1953, and as additional grounds or reasons for granting the Petition for Writ of Certiorari respectfully show unto the Court as follows:

The decision of the Court of Appeals, in effect, construes and applies section 22(a) of the Internal Revenue Code in a manner which is contrary to those fundamental conceptions of free government which underly the Constitution and which sustains a tax that is beyond the constitutional power of Congress to expressly impose. See *Hoeper* v. *Tax Commission of Wisconsin, et al,* 284 U.S. 206. In that case, after quoting from *Knowlton* v. *Moore,* 178 U.S. 41, 77, on the lack of power in Congress to tax the property of one person at rates fixed with reference to the property of another person, the Court said (p. 215):

> We have no doubt that, because of the fundamental conceptions which underly our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. *That which is not in fact the taxpayer's income cannot be made such by calling it income.* (Emphasis supplied.)

The statute involved in the cited case sought to tax to the husband the income received by his wife, which income was composed of a share of the profits of a partnership with which the husband had no connection as well as sal-

ary, interest and dividends. This Court held that the income of the wife cannot constitutionally be taxed to the husband.

In the instant case the Court of Appeals expressly held, (the statement of the respondent to the contrary notwithstanding—Brief in Opposition page 11) that the income in question was received by the wives from a business made *available,* i.e. transferred, to them by the husbands, and, although the husbands retained no interest in such business and did not receive such income or have any control over it, that such income is nevertheless taxable to the husbands as their own income. The Court of Appeals said (R. Pages 213-214):

> • • • As a result of, and in the course of their business experience, petitioners secured the information and learned of the situation with regard to the particular need of the trucking industry for motors at the time in question. They utilized their knowledge, created the market, invested the transactions of purchase with their own credit and reliability, *formed the business structure to carry out the project successfully,* devised its means of operation, provided the agency of performance, and, as a result, accumulated substantial income for themselves. (The foregoing refers to the original 1945 venture of petitioners). They then had their wives form an association *to avail themselves of* petitioner's experience, knowledge, record of past performance, *the business structure, means of operation,* and *agency of performance,* as well as the market created through their efforts, *and to receive the income for themselves* (*the wives*) with no more than a token contribution to its production. If they wished to provide their wives with income by way

> of gift, petitioners themselves would, of course, be subject to the payment of income tax thereon. The Tax Court held that petitioners could not provide their wives with income by the means above described without likewise paying income tax thereon, * * *. (Emphasis supplied).
>
> In our opinion, the fact that the wives entered into these ventures did not have the result that the income derived from them was income of the wives.

The Court of Appeals did not hold, as the respondent asserts (Brief in Opposition page 11), that the husbands merely diverted income from their own business enterprises to the wives. The Court of Appeals did not hold, the Tax Court did not find, and there is no evidence that the income here in question received by the wives had been realized or produced by the husbands, the petitioners, prior to the transfer of the business to the wives. On the contrary, the Findings of Fact of the Tax Court expressly show that the income in question was not realized or produced until after the business had been transferred to the wives. This clearly appears from the Findings of Fact of the Tax Court showing that the sales of motors producing the income were made after formation of the wives' ventures and by them, to which petitioners had made available, or transferred, the business structure (R. 182(a)-189(a)); and particularly from the following specific findings (R. 188(a)-189(a)):

> Other than as outlined above in connection with Kipp and Pierce Associates (the original 1945 venture of petitioners initiating the business), all the petitioners did not join together in any other ventures to buy or sell surplus war materials. None of

> the petitioners contributed any capital other than by way of gift or loan as outlined above to the three wives' ventures and none of the profits from those ventures were paid over to the petitioners. Petitioners did not act on behalf of their wives in connection with the wives' ventures.

Heretofore, it has been held and generally thought to be established that income derived by one taxpayer from the sale of property or from a business, which had been transferred, assigned or made available to such taxpayer by another person (whether the relationship between the two persons be corporation and stockholder or husband and wife), is the income of the transferee or donee taxpayer and is not income taxable to the transferor or donor taxpayer. And the fact that the transfer of the property or business was expressly made for the purpose of reducing the taxes that might otherwise be paid on such income if the sale had been made, or the business continued, by the transferor or donor taxpayer does not warrant the conclusion or inference that the income is income of the transferor or donor. See *U. S.* v. *Cumberland Public Service Co.*, 338 U. S. 451; *Wodehouse* v. *Commissioner*, 177 Fed (2d) 881 (C.C.A. 2d); and; *Henson* v. *Commissioner*, 174 Fed (2d) 846 (C.C.A. 5th). If, in the instant case, petitioners first had purchased the motors, from the sales of which the income in question was derived, and had made gifts of such motors to their wives who later sold them in the market known to exist, under the rule noted the income from such sales could not be attributed to petitioners and called their income. There would seem to be even less warrant for attributing to petitioners income derived by the wives from sales of motors, where, as here, petitioners,

instead of first purchasing the motors and making gifts thereof, transferred or made available to their wives the source from which the wives purchased the motors and then sold them. cf. *E. W. King,* T. C. Memo Decision May 25, 1949 (8 T.C.M. 528).

It is true the Court of Appeals sustained *the inference* drawn by the Tax Court that the income received by the wives from the business after the transfer was the income of the husbands, the petitioners (R. 214), but such an inference was the ultimate conclusion of the Tax Court on the facts and was not a finding of fact, as the Tax Court itself expressly recognized (R. 192(a)), where it was said:

> We have carefully studied the numerous cases cited by petitioners to sustain their contention; *but the issue here is one to be determined solely by the ultimate conclusion to be drawn from the facts in this case* * * *. (Emphasis supplied.)

Although the Tax Court stated as its ultimate conclusion, whether of law or fact, that the income received by the wives from the business after the transfer thereof to them was income of petitioners, and the Court of Appeals sustained such *inference* or conclusion, we submit that that which is not in fact the income of the taxpayers cannot be made such by calling it income. See *Hoeper* v. *Tax Commission of Wisconsin, et al, supra.*

The mere fact that some of the petitioners consulted a tax specialist and received advice concerning the tax problems involved before the transfer of the business to their wives, which the respondent apparently seems to consider significant (Brief in Opposition page 8.), is wholly im-

material. See *U. S.* v. *Cumberland Public Service Co., Supra.* If such circumstance is to be considered significant in determining tax liability, then every transaction in which a taxpayer consults his attorney for advice as to his tax liability in connection therewith would be suspect.

It is certain that if a loss had been sustained on the purchase and resale of motors by the wives' ventures, petitioners would not have been allowed the deduction therefor authorized by the Code (Sec. 23(e), Internal Revenue Code), for the good and sound reason that such losses would not be sustained by petitioners and would not be their losses, but would be losses sustained by the wives and would be losses of the wives, deductible only by them. *Phillips et al* v. *U. S.*, 193 Fed. (2d) 132 (C.C.A. 5th). For the same reasons, the income derived by the wives from their ventures is not the income of petitioners, but is the income of the wives and taxable only to them. The principle should be equally applicable in the one case as in the other. See *Alexander et al,* v. *Commissioner,* 194 Fed. (2d) 921 (C.C.A. 5th).

The instant case is not an isolated one resting upon its own peculiar facts. It is not uncommon, indeed we believe it to be quite the normal and usual thing, for a husband to advise with his wife and to make available to her his more extensive business experience by means of which she may realize and receive income on her own account. Also, it is not at all uncommon for a man having wider business experience and more intimate knowledge of prospective, profitable transactions to make available such experience and knowledge to a friend or relative by means

of which such friend or relative is enabled to realize and receive income for himself. See *Hellman* v. *Glenn*, 36 F. Supp. 423 (W.D. Ky.); *Allen* v. *Beazley*, 157 Fed. (2d.) 970 (C.C.A. 5th). Under the decision of the Court below in the instant case, the Commisioner of Internal Revenue has the power, without statutory or constitutional authority, to call the income so received by the wife, the friend or relative, income of the husband or man whose business experience and more intimate knowledge was availed of and to tax such income to him.

WHEREFORE the petitioners respectfully pray that the Court re-hear and reconsider the Petition for a Writ of Certiorari and that the Petition for Writ of Certiorari be granted.

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CERTIFICATE OF COUNSEL

I John M. Hudson, counsel for petitioners hereby certify that this Petition for Re-hearing is presented in good faith and not for delay. I further certify that the Petition is restricted to substantial grounds not previously presented.

JOHN M. HUDSON
Counsel for Petitioners